(3)

No. 90-844

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF

EARL K. MADSEN*
JIM MICHAEL HANSEN
BRADLEY, CAMPBELL, CARNEY & MADSEN
1717 Washington Avenue
Golden, Colorado 80401-1994
(303) 278-3300

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Petitioners Howard Electrical & Mechanical, Inc. and Howard Systems, Inc. (collectively "Howard") respectfully submit this Reply Brief in support of their Petition for Writ of Certiorari.

ARGUMENT

A. THE TRUSTEES CONFIRM NLRB JURISDICTION OVER THE WITHDRAWAL ISSUE IN THIS CASE, AND THE CRUCIAL FACT THAT NO WITHDRAWAL OCCURRED.

The Trustees concede in their statement of the Question Presented For Review that the issue here, whether Howard implemented a bargaining proposal which constituted withdrawal from the Plan, is an issue that "would under most circumstances by resolved by the National Labor Relations Board."[1] The Trustees do not dispute that Howard did not withdraw from the subject Plan, nor that the identical issue upon which the Trustees based their withdrawal liability claim was resolved by the NLRB in favor of Howard, i.e., that Howard did not implement its bargaining proposal and therefore no withdrawal could have occurred. The Trustees do not dispute that the Tenth Circuit's Decision results in a $555,000 windfall to them. These conceded jurisdictional and operational facts squarely frame the issue of primary

[1] The Trustees in their Opposition Brief at page 1 also assert that this action did not arise out of a labor dispute. If the action did not arise out of a labor dispute, there would be no basis for the conceded NLRB jurisdiction.

jurisdiction presented for this Court's review in the Petition herein.

While the Trustees admit in their Question Presented For Review that the issue of withdrawal liability here would under most circumstances be resolved by the National Labor Relations Board, they do not at any point even mention the issue of primary jurisdiction in the Opposition Brief. The only argument advanced in this context by the Trustees is that, in their view, the basis of their claim is under the Multi-Employer Pension Plan Amendment Act of 1980 (MPPAA) (Opposition Brief, p. 1), and that federal courts have jurisdiction over such claims under that Act (Opposition Brief, p. 5). Having previously conceded that the National Labor Relations Board normally has jurisdiction to hear the particular withdrawal liability issue involved in this case, the Trustees' argument simply raises the issue over which tribunal has primary jurisdiction. The Opposition Brief does not attempt to argue or resolve that issue.

The Petition and the Trustees' Brief in Opposition to the Petition thus present the undisputed facts and issue here. Does the Federal District Court, or for that matter, an arbitrator, under MPPAA, 29 U.S.C. § 1381, *et seq.*, have jurisdiction over the kind of question that is routinely resolved by the administrative agency with expertise in labor law, the NLRB, as the Tenth Circuit held? As Petitioners presented in their Petition, this case raises a difficult and important question regarding the application of *Advanced Lightweight* in this unusual context:

> [W]hether an employer's unilateral decision to discontinue contributions to a pension plan [permanent withdrawal] constitutes a violation

> of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law. There are situations in which district judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. *In cases like this [post-contract expiration, labor law cases] which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB. See San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 245 (1959).

Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Company, 484 U.S. 539, 552, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) (emphasis added).

This Court should grant the Petition and reverse the decision of the Tenth Circuit rejecting this Court's confirmation of NLRB primary jurisdiction in this identical context. Only by this action will the threat to national labor policy resulting from the rejection of the long-standing primary jurisdiction doctrine and the admitted windfall payment of some $555,000, when no withdrawal occurred, as ordered by the Tenth Circuit, be rectified.

B. THE TRUSTEES ERRONEOUSLY ARGUE THAT IT IS "UNIFORMLY RECOGNIZED" THAT ARBITRATION IS MANDATORY.

The Trustees argue that it is now "uniformly recognized" that MPPAA arbitration "is mandatory" for any MPPAA related issue. (Opposition Brief, p. 7). Several cases are cited and discussed. However, it is indeed not uniformly recognized that MPPAA arbitration is mandatory in every case. Further, the Trustees fail to mention

that not one of these cases upon which they rely joins the primary jurisdiction issue presented in this case. These cases are also distinguishable on other grounds.[2]

---

[2] The Trustees, at pages 7 and 8 of their Opposition Brief, cite to a series of cases for this erroneous proposition: *IAM National Pension Fund v. Clinton Engines*, 825 F.2d 415 (D.C. Cir. 1987); *Teamsters Pension Fund v. McNicholas Transportation Co.*, 848 F.2d 20 (2d Cir. 1988); *ILGWU National Retirement Fund v. Levy Brothers Frocks*, 846 F.2d 836 (2nd Cir. 1988); *Central States Pension Fund v. Time D.C.*, 826 F.2d 320 (5th Cir. 1987) *cert. denied*, 284 U.S. 1030, 108 S. Ct. 732; *Flying Tiger Line v. Teamster Pension Fund of Philadelphia*, 830 F.2d 1241 (3d Cir. 1987); *Marvin Hayes Line, Inc. v. Central States Pension Fund*, 814 F.2d 297 (6th Cir. 1987); *Mason & Dixon Tanklines v. Central States Pension Fund, et al.*, 852 F.2d 156 (6th Cir. 1988); *Robbins v. Admiral Merchants Motor Freight Co.*, 846 F.2d 1056 (7th Cir. 1988); *Western Teamsters Fund v. Allyn Transportation Co.*, 832 F.2d 504 (9th Cir. 1987).

Not one of the cases cited involves previously invoked NLRB jurisdiction on pending charges on the identical factual claim subsequently raised in the MPPAA proceeding. None involve application of the doctrine of primary jurisdiction. Federal appellate courts have favored ERISA (MPPAA) arbitration where there was no claim of NLRA jurisdiction, or any NLRB proceedings. In those instances a question of MPPAA statutory interpretation, standing alone, has been held to not excuse arbitration for an otherwise proper MPPAA claim. *See IAM National Pension Fund v. Clinton Engines, supra; Marvin Hayes Lines, Inc. v. Central States Pension Fund, supra; Mason & Dixon Tank Lines v. Central States Pension Fund, et al., supra* (for some statutory issues not involving a jurisdictional challenge) and *see ILGWU National Retirement Fund v. Levy Bros. Frocks, supra.*

In cases where employers have simply argued that their admitted withdrawals from funds occurred before the effective date of the statute, and they therefore had no obligation to

(Continued on following page)

In fact, not only is it not "uniformly recognized" that arbitration "is mandatory," as alleged by the Trustees, but, on the contrary, a number of exceptions to MPPAA arbitration have developed as now well settled doctrines.

(Continued from previous page)

arbitrate such claims, courts have resolved those questions in favor of ERISA arbitration. *See Robbins v. Admiral Merchants Motor Freight Co., supra; Western Teamsters Fund v. Allyn Transportation Co., supra.*

In *Teamsters Pension Fund v. McNicholas Transportation Company, supra,* the Company ceased contributions to a fund at a plant where it had no labor dispute, but because its employees represented by the same union were on strike against the Company at another of its plants where there was a labor dispute. There were no prior NLRB proceedings, and no challenge to the jurisdiction of the court in the ERISA proceeding. The court held arbitration was required over that withdrawal, but significantly pointed with approval to the decision in *T.I.M.E. DC, Inc. v. Management Labor Welfare & Pension Funds of Local 1730,* 756 F.2d 939, 945 (2d Cir. 1985), holding that in circumstances where there is no question of fact for the ERISA arbitrator, and the question of statutory interpretation at issue is outside the scope of the issue Congress directed for the arbitrator in ERISA matters, there is no requirement for the exhaustion of the arbitration remedy. *See* 848 F.2d at 22.

In *Central States Pension Fund v. T.I.M.E. DC, supra,* the court in fact held ERISA arbitration was not applicable where it would lead to irreparable harm to the employer, or would not lead to the application of superior expertise, nor promote judicial economy. The court simply held the employer did not make a showing of facts sufficient to excuse a failure to exhaust administrative remedies, noting, however, that arbitration was not a jurisdictional prerequisite to district court review under ERISA. 826 F.2d at 328, 329.

None of these cited cases is dispositive of the issue before this Court.

Courts find that MPPAA arbitration is not mandatory but is rather in the nature of an administrative remedy which should, normally, be exhausted. Like any other administrative remedy, however, exhaustion is not required (i.e., MPPAA arbitration is not required) when certain "exceptions" apply. *See Central Transport, Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 816 F.2d 678 (6th Cir. 1987) (*per curiam affirming* 639 F. Supp. 788 (E.D. Tenn. 1986)), *cert. denied*, 484 U.S. 926, 108 S. Ct. 290, 98 L.Ed.2d 250 (1987); *Mason & Dixon Tanklines v. Central States, etc.*, 852 F.2d 156, 167 (6th Cir. 1988) (jurisdictional issue whether the company was a covered employer under ERISA was held not arbitrable, but after that issue was resolved, the issue of whether the two businesses involved were under common control was an issue requiring ERISA arbitration); *Carrier's Container Council v. Mobile S.A. Assoc.*, 896 F.2d 1330, 1345 (11th Cir. 1990); *Park South Hotel v. New York Hotel Trades Council*, 851 F.2d 578 (2d Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S. Ct. 493, 102 L.Ed.2d 530 (1988); *Dorn's Transp. v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986); *Cuyamaca Meats v. San Diego Script & Imperial Counties Butcher & Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987). *See* Howard's Petition at 17-23.

Still other courts have excused MPPAA arbitration under the doctrine of "equitable tolling." *See Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 875 F.2d 1285 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 563, 107 L.Ed.2d 558 (1989); *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 644 (4th Cir. 1983); *The Flying Tiger Line, Inc. v. Central States, S.W. and S.E. Areas Pension Fund*, 659 F.

Supp. 13 (D. Del. 1986), *aff'd* 830 F.2d 1241, 1246-1247, 1256 (3d Cir. 1987). *See* Howard's Petition, at 23-26, including citation of other authority.[3]

The Trustees are simply wrong in their argument that it is "uniformly recognized" that MPPAA arbitration "is mandatory" in all circumstances. As shown, and to the contrary, the Federal Courts of Appeals (other than the Tenth Circuit) have carefully formulated exceptions to the arbitration requirement, to avoid draconian and inequitable results, in recognition of the fact that MPPAA arbitration is not jurisdictional. The Tenth Circuit, by failing to properly apply the law adopted by the sister circuits, has created a conflict with those courts. The Tenth Circuit Decision conflicting with the other circuits' decisions does not simply allow arbitration to "reign supreme." It

---

[3] The Trustees assert that Howard did not raise the equitable tolling issue until the Petition for Rehearing. Opposition Brief, pp. 11-12. The trial court proceedings were held on the primary jurisdiction issue in the context of summary judgment motions of both parties. Until the unprecedented Decision of the Tenth Circuit here, the issue of equitable tolling could not have been raised. There was no basis for an equitable tolling claim. *See* Howard's Petition, p. 26. No stronger case for equitable tolling could be made in light of the Tenth Circuit's Decision than the conceded facts that no withdrawal occurred, that the NLRB's decision on the issue of withdrawal liability here was its jurisdiction to make "under most circumstances" (Trustees' Question Presented For Review), and when, in light of those facts, previously determined by the NLRB, there could be no factual determination made by the arbitrator other than to adopt the NLRB's decision. To now argue that there is some substantive decision required for MPPAA arbitration is to blink the conceded facts in the case.

mandates that arbitration "reigns in absurdity" without regard to the nature of the legal issues presented, without regard to the conceded facts of record, and without regard to the long-standing federal scheme of adherence to the primary jurisdiction of the NLRB in resolving disputes falling squarely within its NLRA statutory authority.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EARL K. MADSEN* & JIM MICHAEL HANSEN
BRADLEY, CAMPBELL, CARNEY & MADSEN
1717 Washington Avenue
Golden, Colorado 80401-1994
(303) 278-3300

* Counsel of Record